

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GARY T. KENDELLEN, Regional Director
of Region 22 of the National Labor
Relations Board for and on behalf of
the National Labor Relations Board,

Petitioner,

v.

EVERGREEN AMERICA CORPORATION,

Respondent.

04-598 (WGB)

O P I N I O N

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BASSLER, SENIOR DISTRICT JUDGE:

Gary T. Kendellen, the Regional Director of Region 22 of the National Labor Relations Board ("Board" or "Petitioner"), petitioned this court for temporary injunctive relief pursuant to Section 10(j) of the National Labor Relations Act (the "Act").

Section 10(j) authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. National Labor Relations Act § 10(j), as amended, 29 U.S.C.A. § 160(j).¹

The Board alleges that Evergreen America Corporation ("Evergreen" or "Respondent") violated the Act by engaging in a campaign designed to undermine the efforts of Local 1964, International Longshoremen's Association, AFL-CIO ("Local 1964" or the "Union"). The alleged unfair labor practices include interrogating its employees regarding their union sympathies and the sympathies of other employees; threatening employees with plant closure or relocation, discharge, loss of benefits and other reprisals if they continued to support the Union; and undermining employee support for the Union by making unusually high, across the board, wage increases and promotions, providing

¹The statute reads:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Christmas gift certificates, sponsoring lunches and picnics, and liberalizing the attendance and dress policies.

The Board seeks a cease and desist order to enjoin Evergreen from engaging in such unfair labor practices and a bargaining order requiring Evergreen to negotiate with the Union.

The Court has jurisdiction pursuant to 29 U.S.C.A. § 160(j) and venue is proper pursuant to 28 U.S.C.A. § 1391.

I. PROCEDURAL AND FACTUAL HISTORY

Evergreen's primary business consists of acting as general agent in North America for ocean steamship companies. Its primary activities include generating sales, providing customer service, documentation, arranging for shipside operation and coordination of the inland distribution of cargo in North America. In March 2002, David Chiang and Wayne Ting, two clerical employees of Evergreen, met with Local 1964, to discuss Local 1964's representation of Evergreen employees. Chiang and Ting explained that "management treated [Evergreen employees] unfairly, and . . . employees were concerned about their job security." July 25, 2005 Opinion of Administrative Law Judge ("ALJ") 11:35-38. In mid-April 2002, Local 1964 began seeking unionization from Evergreen employees

After holding a meeting on April 15, 2002, Local 1964 distributed authorization cards which would allow the Union to represent the employees. The employees also formed an Organizing

Committee to circulate additional cards among the employees that were not able to attend the meeting. As a result of this process, Local 1964 was able to obtain 66 authorization cards from the employees.² Believing that it held a majority of the employees' votes, Local 1964 filed a petition with the NLRB on June 4, 2002 seeking an election. When the election was held on July 17, 2002, however, the employees voted 61 to 52 against the Union. Local 1964 filed a charge against Evergreen on July 19, 2002, claiming that Evergreen had engaged in unfair labor practices to prevent the employees from voting in favor of the Union.

The Board issued its first Complaint against Evergreen on December 31, 2002. Labor 1964 filed additional charges and the Board amended the original complaint several times. The Fourth Amended Complaint alleges that Evergreen violated Section 8(a)(1) and (3)³ of the Act by unlawfully interrogating employees,

²The ALJ determined that there were 115 employees in the bargaining unit as of June 15, 2002, which he deemed the appropriate date for measuring majority status based on payroll records. ALJ 13:8-11.

³Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act to organize or to refrain from such activities. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees because of the exercise of their Section 7 rights. Section 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

threatening them with plant closure, granting excessive wage increases, promoting an excessive number of employees, liberalizing its attendance policy and its dress code and engaging in various other conduct in violation of the Act.

On February 13, 2004, the Board filed its petition for Section 10(j) injunctive relief pending a final decision by the Board. Subsequently, this Court decided incorrectly to await the conclusion of the administrative hearing before taking further action.⁴

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

⁴See Fuchs v. Hood Ind., 590 F.2d 395 (1st Cir. 1979) (holding that district court's decision to stay proceedings on petition for temporary injunction pending decision of administrative law judge without hearing to determine merits of petition in light of nature of injunctive relief contemplated by Section 10(j) of the NLRA was in excess of judicial discretion).

II. ALJ FINDINGS⁵

The ALJ ruled that as of June 15, 2002 the Union had attained majority status.⁶ The ALJ spent thirteen pages relating the testimony of the Organizing Committee and other employees concerning how authorization cards had been distributed and collected from employees in clerical positions (considered within the "bargaining unit") at Evergreen.⁷ The ALJ concluded that the

⁵Since the ALJ went into a detailed discussion of the facts of the case, this Court will not rehash them here, but will note those facts that are relevant to the Court's decision. Additionally, to the extent Evergreen suggests that the Court needs to make independent factual findings based on its own evidentiary hearing in its letter to the Court dated April 10, 2006, the Court notes that it may rely on the record of the Administrative Law Judge. Eisenberg v. Honeycomb Plastics Corp., No 86-3484, 1987 WL 109093, at *1 (D.N.J. Jan. 9, 1987) (citing Squillacote v. Graphic Arts Int'l Union AFL-CIO, 540 F.2d 853, 860 (7th Cir. 1976)). The administrative record, developed over a 43-day trial, is an ample statement of the factual allegations in this case.

⁶Evergreen makes several assertions regarding the validity of the authorization cards and whether certain claims are time-barred. Evergreen Memorandum in Opposition to the Application for Injunctive Relief ("Evergreen Opp. Mem.") at 22. The Court's function is limited to a determination of whether contested factual issues could ultimately be resolved by the Board in favor of General Counsel. Squillacote, 540 F.2d at 860. It is not the role of this Court to determine the merits of the Petitioner's case, therefore, the Court will not address these issues. See supra at 13.

⁷The bargaining unit is all full time and regular part time office clerical employees employed at the Employer's office facility, including the following classifications/departments: documentation, general affairs, logistics, marine, projection, quality, financial, auditing, funds and accounting, import/export traffic and also logistics employees who work at the Maher Terminal in Jersey City, New Jersey but excluded all other employees, such as, port captains, assistant port captains,

testimony of those employees was credible and ruled that the Board had "adduced sufficient evidence that 62 employees at Respondent signed cards authorizing the Union to represent them." ALJ 25:50-51.

The ALJ noted that when the Union began circulating campaign literature, the literature was consistent with the fears of the employees, which prompted them to seek Union representation. ALJ 27:26-28. Leaflets distributed by the Union stated that "union representation would protect employees from job loss or from Respondent moving, closing or relocating its facilities." Id. Another flyer emphasized that Evergreen had promised employees in Tacoma and San Francisco that Evergreen would not move its offices to Salt Lake City and that the employees' jobs were safe. The flyer noted that Evergreen, however, did move the Tacoma and San Francisco offices to Salt Lake City, but that the Los Angeles employees, who had voted for a union, retained their jobs. ALJ 28:16-22.

Evergreen responded by issuing its own flyer written with a "Guarantee" attached, signed by President Thomas Chen. The guarantee stated that Evergreen had not threatened to move or retaliate against the employees and issued a firm commitment to

engineers, confidential and managerial employees, sales employees and sales coordinators, computer programmers, professional employees, watchmen, guards and supervisors as defined in the Act.

stay in New Jersey. ALJ 29:24-32.

In stark contrast to these promises, several employees testified that they began to be interrogated by their supervisors regarding their support for the Union. Chris Yu, a finance section employee, testified that her supervisor Kevin Huang called her the night before the election to say that if the employees chose the Union the company would close and asked if she knew how two of her co-workers felt about the Union [Tr. 1824].⁸ Yu further testified to several meetings between April and the election on July 17, 2002 in which Executive Vice President Raymond Lin threatened plant closure [Tr. 1890]. At the meeting, Lin purportedly asked the employees not to support the Union stating that if they joined the Union the company may close or move [Tr. 1838]. In addition, Yu was called into Lin's office and asked to support the company and not to join the Union [Tr. 1892-1895].

Yu's testimony was consistent with the testimony of Michelle Shen, who worked in the finance section. Shen's supervisor was also Kevin Huang, who told Shen that the Union was no good for the company [Tr. 1745-1746]. Like Yu, Shen stated that she received phone calls at home from Huang, who had never called her before, asking her who was supporting the Union [Tr. 1741, 1755].

⁸Tr. is the abbreviation for the administrative hearing transcripts.

Shen testified that she was called to Vice President Lin's office and questioned about whether she was happy with her salary, which she had never been questioned about before [Tr. 1756]. After receiving a call from Lin the night before the election, Shen stated that she was too frightened to go to Union meetings or read Union flyers at work [Tr. 1762]. Neither Huang nor Vice President Lin testified at the administrative hearing.

Several other employees testified to similar experiences as Yu and Shen [See Tr. 288, 783, 1138, 2113, 2384]. In addition, Shirley Chiu and Kerry Bogran testified to being taken out to dinner and lunch during the organizing drive for the first time in their careers [Tr. 2746; 2755]. Jason Wu, Chiu's supervisor testified that he had taken employees to lunch before the Union began organizing, however his subpoenaed expense records did not support his claim [Tr. 5903]. Likewise, Kerry Bogran stated that she had never been out with her manager Ray Yen, until the organizing drive began. Bogran's lunch with Yen was followed by a second invitation to lunch by managers Howard Tsung and Jack Wang. Bogran testified that she was asked about the Union and whether people were concerned about the company moving [Tr. 2758]. Although Tsung asserted that he had taken employees out for meals prior to the organizing drive he could not remember the name of one employee, the place that they went or who paid the bills [Tr. 5721].

The Fourth Amended Complaint further alleges that the company solicited grievances and made promises in an effort to undermine Union support. Mike Gunshefsky who worked in the traffic export section testified that his boss, Guy Siniscalchi, along with the Junior Vice-President Dan Grogg met with Gunshefsky's group and asked what changes the employees wanted to see [Tr. 1140]. Gunshefsky noted that he was informed that management wanted to form an employee committee to speak with management about employee requests [Tr. 1444]. Additionally, Gunshefsky stated that at a group meeting, comprised of about 50 employees, President Thomas Chen stated that the Union was not good for the company, the Union was full of mobsters, and that the company would make the changes that the employees wanted, rendering a Union unnecessary [Tr. 1145].

As a result of conversations (held at lunches and dinners) with its employees, Evergreen implemented a year round casual dress policy, employees were allowed to use sick leave to care for family members, which employees could not do before the organizing drive and time and attendance policies became more flexible. The record contains substantial testimony regarding the increase in social events that Evergreen instituted, including a company sponsored Fourth of July barbecue, a luau in September and several free breakfasts, lunches and dinners. Evergreen also changed its longstanding policy that did not allow

spouses to attend the company's Christmas dinner. It also provided each employee with a \$400 gift card. Additionally, Evergreen extended a company-wide pay increase of \$400 to each employee on July 15, 2002 and made a number of promotions.

On July 25, 2005, the ALJ made the following findings of fact and conclusions of law:

3. By coercively interrogating its employees, concerning their activities on behalf of the Union or how they intended to vote in an NLRB election, threatening its employees with plant closure, loss of jobs, loss of benefits, or other unspecified reprisals because of their union activities, soliciting grievances from employees, while impliedly promising to remedy such grievances, promising its employees raises, promotions, changes in its grievance procedure, changes in sick leave procedure, or other improvements in their terms and conditions of employment, in order to persuade them to not support the union, ordering and instructing its employees not to attend union meetings, read union literature and to throw such literature in the garbage, and by creating the impression that the union activities of its employees are under surveillance, Respondent has violated Section 8(a)(1) of the Act.

4. By granting excessive across the board increases to its employees, and excessive amounts of promotions on July 1, 2002, and by granting other benefits such as allowing its employees to make up for 10 minutes of lateness by making up the time at the end of the day, allowing employees flextime schedules, posting job vacancies on its electronic bulletin Board, changing its policy of casual dress, permitting employees to use sick days to care for a family member and to carryover unused sick days to the following year, permitting employees to substitute Good Friday for Martin Luther King day as a paid holiday, changing the age limit for its voluntary separation program, allowing employees to bring spouses or guests to Respondent's year end Holiday party, and distributing a \$400.00 gift certificate to all employees in December of 2002, in order to discourage employees from supporting the

Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

ALJ 145:25-46.⁹ Based on its findings, the ALJ ruled that it would recommend that the election be set aside and that a bargaining order be imposed.

III. 10(j) INJUNCTIVE RELIEF STANDARD

To grant interim injunctive relief under § 10(j) a district court must determine: (1) whether there is "reasonable cause" to believe that unfair labor practices have been committed; and (2) whether the injunctive relief sought is "just and proper."

Unlike a preliminary injunction, to obtain a 10(j) injunction, the Regional Director of the Board need not show irreparable harm or the likelihood of success on the merits. Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084 (3d Cir. 1984).

A. Reasonable Cause Standard

The reasonable cause standard requires the district court to find: (1) that the Regional Director's case depends upon a substantial, non-frivolous legal theory, implicit or explicit; and (2) that there is sufficient evidence, taking the facts

⁹Petitioner also alleged that Evergreen fired Gunshefsky for his participation in the Union campaign. The ALJ, however, did not find that Gunshefsky's termination was an unlawful practice. ALJ 131:20-21. Gunshefsky was fired for cursing, but had been suspended once prior to his termination and had received warnings regarding similar conduct before. Although the ALJ noted that he might believe that terminating an employee for cursing is unfair or unjust, he would not substitute his judgment for the employer's as to what constitutes appropriate discipline. ALJ:1319-13. This Court agrees.

favorably to the Board, to support that theory. Id. The district court's sole function in this respect is to determine whether the Board could ultimately resolve any contested factual issues raised by the evidence presented in favor of the Petitioner. Fuchs, 590 F.2d at 397. The district court should not attempt to resolve disputed facts or determine the credibility of witnesses. Schauffler v. Local 1291, Int'l Longshoremen's Ass'n, 292 F.2d 182, 186 n.4 (3d Cir. 1961). The ultimate determination with respect to issues of both fact and law, is reserved exclusively for the Board, subject to review by the Court of Appeals pursuant to §§ 10(e) and (f) of the Act.

The evidence supports the Petitioner's position that Evergreen threatened its employees with plant closure or relocation, discharge, loss of benefits and other reprisals if they continued to support the Union. Debbie Reynolds Hotel, Inc., 332 NLRB 466 (2000) (ruling that it is a violation of § 8(a)(1) to threaten employees with plant closure in the event of unionization); Rossmore House, 269 NLRB 1176 (1984) (finding that it is a violation of § 8(a)(1) to interrogate employees about their interests in unionization if the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights).

The evidence also supports Petitioner's assertion that Evergreen offered its employees benefits to undermine the efforts

of the Union. The Court recognizes that the mere grant of benefits during the campaign drive is not, per se, grounds for setting aside an election. See Noah's Bay Area Bagels, LLC, 331 NLRB 188, 189 (2000). The critical inquiry, however, is "whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect." Id. The Court finds that there is reasonable cause to believe that Evergreen's actions were intended to influence employees not to vote for the Union.

Evergreen claims that the allegations of threats are based solely on "isolated snippets" or "isolated interrogation[s]" of its employees. Evergreen Opp. Mem. at 22, 31. The Court notes that several Evergreen employees testified that threats regarding plant closure were made at group meetings or group lunches and dinners. Nevertheless, the isolated discussions that Evergreen employees testified about having with supervisors and top management officials are no less supportive of Petitioner's claim that there is reasonable cause to believe that Evergreen violated § 8(a)(1) and (3) of the Act.

Evergreen further argues against the claims that it threatened loss of jobs asserting that the evidence shows that Evergreen "scrupulously honored [its] commitment" not to commit any reprisals against employees regardless of the outcome of the election. Evergreen Opp. Mem. at 13. This argument is not

persuasive: the fact that Evergreen did not fire any of its employees after the election does not prove that Evergreen did not threaten to do so before the election.

Based on the extensive testimony provided in the administrative record, the Court finds that there is reasonable cause to believe that Evergreen committed unfair labor practices.

B. Just and Proper Standard

Injunctive relief is "just and proper" under § 10(j) "when the nature of the alleged unfair labor practices are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation." Pascarell v. Vibra Screw, Inc., 904 F.2d 874, 878 (3d Cir. 1990). The critical question the Court must answer is: absent an injunction, will the Board's ability to facilitate peaceful management-labor negotiations be impaired? In addition, the Court must give deference to the Board's determination that the integrity of the bargaining process requires interim protection. Id. at 879, n.7.

Evergreen argues that the bargaining order¹⁰ requested by Petitioner is not necessary to effectuate the remedial purposes of the Board. Evergreen Opp. Mem. at 27. The Court disagrees. In Moore-Duncan v. Horizon House Developmental Services, 155 F.

¹⁰The Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), discussed the standard for imposing a bargaining order.

Supp. 2d 390, 396 (E.D. Pa. 2001), the court imposed a bargaining order finding that:

The bargaining process is harmed when an employer's actions weaken a union, and that union's ability to provide effective representation is diminished. If the union cannot negotiate for better terms and conditions of employment, the interest of the employees in representation will dissipate. The impotence of the union and the loss of employee interest can create a mutually reinforcing cycle, as a lack of support among employees further diminishes the union's strength and, consequently, its ability to press for improvements that would demonstrate its worthiness to the members of the bargaining unit. If negotiations are eventually ordered by the N.L.R.B. at the end of the administrative process a union which has been weakened in the interim by the employer's actions will be hard-pressed to secure improvements in wages and benefits at the bargaining table.

(citing NLRB v. Schill Steel Products, Inc., 480 F.2d 586, 590 (5th Cir. 1973)).

Evergreen also contends that a bargaining order is not necessary with the passage of three years (now four years) since any of the alleged unlawful conduct occurred. This argument weighs against its position. As the court stated in Horizon House Developmental Services, the Union's ability to represent its employees will continue to weaken until the Board makes its determination. Therefore, this Court finds that it is in the public interest to grant a bargaining order. See Moore-Duncan, 155 F. Supp. 2d at 396. An injunction would temporarily restore the parties to their respective situations prior to the respondent's allegedly unlawful behavior. Moreover, an interim

bargaining order will not impose significant burdens on Evergreen, as it suggests, because any contract can be made subject to rescission in the event that the Board should dismiss the complaint and determine that Evergreen acted lawfully. See Pascarella v. Gitano Group, 730 F.Supp. 616, 625 (D.N.J. 1990).

Evergreen further argues that the Court should allow the Board to address the circumstances by using the traditional remedies, which the court in Hialeah Hospital, 343 NLRB No. 52 2004 WL 2461358, at *1 (2004)-relied on heavily by Evergreen-found effective. In Hialeah Hospital, the Board disagreed with the ALJ, finding that a bargaining order was unnecessary because the coercive effects of the Respondent's unlawful conduct could be erased, and a fair rerun election ensured by the use of traditional remedies. Id. The court distinguished the facts of its case-where the bargaining unit consisted of only 11 employees, only one employee was fired unlawfully and the company conducted surveillance on one employee-from those cases where many unlawful interrogations had occurred and numerous threats of plant closure had been made. Id., at *6 (citing Adam Wholesalers, Inc., 322 NLRB 313 (1996); Flexsteel Ind., 316 NLRB 745; Electro-Voice, Inc., 320 NLRB 1094 (1996)).

The Court finds that the present case is comparable to those cases which the Hialeah Hospital court distinguished from its

case and where extraordinary circumstances were found to justify a bargaining order. In Garney Morris, Inc., 313 NLRB 101, 102 (1993), the court noted that in making its decision, the Board may properly consider "the extensiveness of the unfair labor practices in terms of their continuing effect on election conditions and the likelihood of their recurrence in the future to determine if the conduct has a tendency to undermine majority strength and impede the use of traditional remedies." (citing Gissel Packing Co., 395 U.S. at 614-15).

Top employees in Evergreen's management talked to numerous employees about plant closures and the danger of joining the Union. These threats along with the numerous benefits that Evergreen provided to encourage employees not to join the Union have created a situation in which the Union will continue to lose its bargaining power if a bargaining order is not imposed. In fact, Evergreen has committed hallmark violations by making threats of plant closure and offering wage increases and promotions far beyond what it regularly made, which courts have found justify a bargaining order. M.J. Metal Products, Inc., 328 NLRB 1184 (1999). The Court is convinced that a bargaining order is necessary.¹¹

¹¹Evergreen asserted at oral argument on April 12, 2006 that changed circumstances also weigh against a finding that a bargaining order is just and proper. The Court does not find that these circumstances justify not imposing an order where Evergreen engaged in numerous unfair labor practices making a

IV. CONCLUSION

In conclusion, the Court finds that (1) there is reasonable cause to believe that Evergreen committed unfair labor practices and (2) the injunctive relief and bargaining order requested by the Board are just and proper. Therefore, the Court **grants** the Board's petition for a temporary injunction.

An appropriate Order accompanies this Opinion.

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.S.D.J.

Dated: April 12, 2006

bargaining order necessary to remedy its conduct.